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Shale Gas in the European Union: You, me, together? Reflections from a Subsidiarity Perspective

by L. Reins

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Shale Gas in the European Union: You, me, together? Reflections from a subsidiarity perspective

Leonie Reins

Introduction

The positions of the European Member States on shale gas legislation and policy are quite divergent, ranging from banning of the activity in France to exploratory drilling in Poland and the United Kingdom, as discussed elsewhere in this volume.[1] A common European position seems hard to establish, as demonstrated by the Council's refusal to include a mandatory environmental impact assessment (EIA) on shale gas into a revised EIA Directive.[2] The Commission has nonetheless established some minimum principles on shale gas in the form of a non-binding Recommendation.[3] This is at first sight quite surprising. Government officials, NGOs, and the Committee of the Regions (CoR) had all asked for a stringent regime due to the associated negative environmental impacts of the activity and uncertainties how and if these evolve in practice as well as due to the large public opposition in the Member States.[4] However, if one steps away from the political dimension of the debate and concentrates on the legal perspective, it becomes well apparent that the hands of the European Institutions might be tied. Shale gas is not so easily comparable to other environmental issues that easily pass the subsidiarity hurdle.[5]

This paper focuses on the legal perspective to the challenge outlined above. Taking into account that the energy and environmental competences of the Union are shared,[6] several questions emerge: how far does the Union's competence reach from a subsidiarity and proportionality perspective? Does the Union have competence to introduce a legal measure on shale gas? Is the recently published Commission Recommendation on minimum principles for unconventional hydrocarbons an escape route in this regard?

Through the blocking of a mandatory EIA, the pro-active shale gas Member States have made it clear that European involvement into the issue is not welcomed. The underlying question is thus: to what extent can the European Union at all engage in the issue? The

[1] See also L. Reins, 'European minimum principles for shale gas: preliminary insights with reference to the precautionary principle' *Environmental Liability Journal*, forthcoming 2014.
[2] Procedural file 2012/0297 (COD), Amendment of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-413
[3] European Commission, Recommendation of 22 January 2014 on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing, (2014/70/EU), 8.2.2014, OJ L 39/72 ('the Recommendation').
[4] See for example the results of the public stakeholder consultation on "Unconventional fossil fuels (e.g. shale gas) in Europe" available at http://ec.europa.eu/environment/integration/energy/pdf/Presentation_07062013.pdf, as well as Committee of the Regions, Opinion of the Committee of the Regions on 'Local and regional authorities perspective on shale/tight gas and oil (unconventional hydrocarbons)', OJ C 356, 12.2013 at 23-29
[5] See part 1..
[6] Article 4 TFEU.

horizontal division of competences and how this affects the shale gas debate has already been discussed;[7] this contribution focusses on the vertical competences, more precisely on how competences are distributed between the EU and the Member States. Taking into account the question marks outlined above, one has to focus on two essential questions. Firstly, why has the Commission acted at all?; and secondly, why by means of soft law?

1. Why did the Commission act?

In order to establish why the Commission acted on shale gas, one has to go back to some basic principles of European law determining the competences between the Union and its Member States. It is part of the Union's very own nature that the European system is based on close cooperation between the Member States and the Union and its institutions,[8] which can be referred to as co-operative federalism where "national and state governments work together in the same areas, sharing functions and therefore power."[9] Thus, a key characteristic for this form of federalism is the principle of attributed competences. In the Union, three fundamental principles are core in determining the division of competences between the Union and the Member States: the principle of attributed powers or "conferral" (Article 5(2) TEU), as well as the principles of subsidiarity (Article 5(3) TEU) and proportionality (Article 5(4) TEU).

The principle of conferral establishes whether a European Union competence *exists* at all: "*competences not conferred upon the Union in the Treaties remain with the Member States*" (Article 4(1) TEU) and "*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.*" (Article 5(2) TEU).[10] The principle confirms that the Union does not have a general legislative competence. The principles of subsidiarity and proportionality determine the *extent* to which the Union can exercise the competence (Article 5(1) TEU). The subsidiarity principle[11] is included in Article 5(3) TEU and reads: "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*".

[7] L. Reins, 'In Search of the Legal Basis for Environmental and Energy Regulation at the EU Level: The Case of Unconventional Gas Extraction' 23 *Review of European, Comparative & International Environmental Law* 1, 2014, at 125-133.

[8] See also J. Bast and A. von Bogdandy, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' 39 *Common Market Law Review* 2, 2002, at 236.

[9] M.D. Reagan, *The New Federalism***,** Oxford University Press, 1972, at 21, as cited in R. Schutze, 'Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order' *European Law Review*, 2006, at 168. See contrary to this perception G. De Burca, 'Limiting EU powers' *European Constitutional Law Review* 1, 2005, at 95 who is of the opinion that "the [European] system cannot easily be described either as one of dual or co-operative federalism" as the Treaty provisions contain aspects of both.

[10] For in-depth discussion please refer to K. Lenaerts, P. Van Nuffel, *European Union Law*, Sweet&Maxwell, 2013, at 112f.

[11] For a detailed discussion of the role of the subsidiarity principle, the requirements and the application in European law please refer to ibid., at 131 - 140.

Shared Competences

In European Union law there are generally three categories of competence: exclusive, shared, or supportive.[12] In an area of exclusive competence, "*only the Union may legislate and adopt legally binding acts"* (Article 2(1) TFEU). By contrast, in the area of a shared competence, "*the Union and the Member States may legislate and adopt legally binding acts[…]. The Member States shall exercise their competence to the extent that the Union has not exercised its competence*." (Article 2(2) TFEU).

The Recommendation on shale gas is based on the Union's right to "*act in order to address environmental impacts and risks as well as to clarify and/or complement existing environmental legislation*", however acknowledging that "*choices of energy mix remain in the hands of Member States*".[13] Article 4 (2)(e) and (i) TFEU include the area of "environment" as well as "energy" as an area of shared competence. Hence with reference to the subsidiarity and proportionality principle, the Commission has to justify why its action on shale gas (an environmental and energy matter) is better regulated on a Union wide basis.[14]

The choice of the correct legal basis has practical implications. Article 191 TFEU on the environment includes the option for Member States to apply more stringent conditions than a Union measure proposes, the so called "environmental guarantee". That means that the Member States generally have the possibility to establish stricter regulatory measures than included in the Union's legislation. For non-binding Recommendations outlining minimum principles, it is already implied that Member States can adopt stricter measures on shale gas, hence the environmental guarantee in the current state of affairs is not a great relevance, at least *prima facie*. To the extent that the Recommendation lists what are in the Commission's view binding obligations arising out of existing EU law, the environmental guarantee evidently is fully applicable.

Further, Article 194 TFEU asks on the one hand for solidarity and common actions of the Member States to reach the energy and environmental objectives[15] and to ensure the security of energy supply in the Union, but on the other hand, the second paragraph leaves it to the Member States to exploit their resources and to choose their internal supply structure. Shale gas is the first test of this tension between two legal bases.[16]

[12] See also ibid., at 124ff.
[13] European Commission, Staff Working Document, 'Impact Assessment, exploration and production of hydrocarbons (such as shale gas) using high volume, hydraulic fracturing in the EU', Brussels, 22 January 2014, SWD(2014) 21 at 39 ('Impact Assessment').
[14] See next section below.
[15] I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in action', 15 *Columbia Journal of European Law*, 2009, at 49.
[16] See further below, as well as for a detailed discussion of the possible legal bases for shale gas please refer to L. Reins, n. 7 above.

Once the institutions (mostly the Commission) have found "a sufficient legal basis to act" (the "power" to act)[17] it still has to be assessed "*as to whether it should act and, if so, to what extent. […] ("if and in so far as")*".[18] The implications for shale are reviewed in the following section.

Subsidiarity and Proportionality

The subsidiarity principle was originally introduced as a principle for environmental policy only.[19] It was promoted under the Maastricht Treaty in Article 3b to become a general European law principle[20] for determining the competences between Member States and the Union, [21] or put differently the "*duty for Commission and Council to justify the exercise of competences*".[22] The overall aim of the subsidiarity principle is to determine the best level (national or European) to take a measure. The Lisbon Treaty added a new reference to the central, regional or local level for proposed actions, thus emphasising the aim to determine measures at the best possible level of regulation, ensuring that these measures are as close as possible to the citizens.[23] It thus follows the concept of decentralisation assuming that the most appropriate or the best level of regulations is the lowest level.

The subsidiarity principle imposes two criteria which both have to be met for an action at the Union level to be justified. Firstly, the "*objectives of the proposed action cannot be sufficiently achieved by [actions of] the Member States*" and secondly and simultaneously, they can be "*better*" achieved at Union level "*by reason of the scale or effects of the proposed action"*.[24] A proposal of Union action in the area of the environment and energy thus always has to justify why the intended action will be more effective if taken at the Union level and why actions at the national level are not sufficient to achieve a specific aim.[25] The notion of the word "better" remains unclear: the Protocol on the application of the principles which is attached to the Lisbon Treaty only indicates that it should be "*substantiated by*

[17] K. Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism' 17 *Fordham International Law Journal* 4, 1993, at 875.
[18] Ibid.
[19] See also ibid., at 859, as well as R. Schutze, n. 9 above, at 173 and G. Van Calster and K. Deketelaere, 'Amsterdam, the IGC and greening the EU Treaty' *European Environmental Law Review*, 1998, at 12-25.
[20] See also M. Lee, 'The Environmental Implications of the Lisbon Treaty' 10 *Environmental Law Review* 2, 2008, at 136.
[21] For the history of the negotiations on the principle and its inclusion in the Treaty see J. Golub, 'Sovereignty and Subsidiarity in EU Enviornmental Policy' *Political Studies* XLIV,1996.
[22] A. Faludi, 'Territorial Cohesion and Subsidiarity under the European Union Treaties: A Critique of the 'Territorialism' Underlying' 47 *Regional Studies* 9, 2012, at 1598.
[23] thus reflecting the "proximity of government", see K. Lenaerts, n. 17 above, at 865.
[24] Article 5 Protocol No 2 on the application of the principles of subsidiarity and proportionality. This is supported by the second paragraph of Article 5(3) TEU which refers to Protocol No. 2 to the TEU (originally adopted as Protocol No. 30 on the application of the Principles of Subsidiarity and Proportionality under the Amsterdam Treaty) and states that *"The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol."*
[25] In the case of the Recommendation on shale gas, the section on "the EU's right to act and justification" is included in the Impact Assessment, n. 13 above at 39f. See also further below.

qualitative and, wherever possible, quantitative indicators".[26] However, as de Sadeleer puts it, this can mean "*more effective, more consistent, more democratic, more consistent with the internal market obligations, etc.*" [27]

Generally, measures in the area of environmental law and policy are said to pass the subsidiarity hurdle "quite easily".[28] Prominent argumentation for European involvement in environmental issues are the often transboundary nature of the environmental problem(s); the overall aim of a high level of environmental protection and that unilateral measures in the environmental area lead to a distortion of competition and thus contravene the internal market objectives.[29] In this regard, Lenaerts already in 1993 concluded that "*'subsidiarity' will not stand in the way of the further development of Community [now Union] environmental policy along the lines that it has been following so far*."[30]

In the case of its action on shale gas, the Commission indeed justified its action in the area of shale gas on grounds of the transboundary impacts of shale gas as due to the geology of the shales (7 European shale basins are situated in two or more Member States) and that *"[e]nvironmental risks and impacts may* ***spread across national borders****"* [original emphasis].[31] The Impact Assessment refers to the specific transboundary risks for surface and ground waters (at minimum 268 transboundary water bodies), air quality and GHG emissions.[32] From the Commission's point of view, Union action is thus needed and justified in the area of shale gas.

The principle of subsidiarity has to be read in conjunction with the principle of proportionality.[33] Whereas the subsidiarity principle relates to the necessity of a Union measure, the proportionality principle determines the intensity of a measure. Paragraph 4 of Article 5 TEU states that "*under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*." The three underlying aspects are (a) the sustainability or appropriateness between the means and the end of a measure, (b) the necessity of the action to achieve the proposed Union objective (in the area of the environment the objectives under Article 191 TFEU) and (c) the proportionality of the measure itself (*stricto sensu*), meaning whether the measure is disproportionate in respect of the goal intended.[34] Article 5 to the Protocol further establishes that, amongst others, the financial impact of a proposed legislative act needs to be taken into

[26] Article 5 Protocol No 2. See on the notion of efficiency and effectiveness in determining the need for Union action: K. Lenaerts, n. 17 above, at 877.
[27] Nicolas de Sadeleer, 'Principle of Subsidiarity and the EU Environmental Policy', 9 *Journal for European Environmental & Planning Law* 1, 2012, at 64.
[28] Ibid., 64f.
[29] Ibid.
[30] K. Lenaerts n. 17 above, at 852.
[31] Impact Assessment, n. 13 above at 39.
[32] Ibid.
[33] For a detailed discussion of the role of the proportionality principle, the requirements and the application in European law please refer to See also K. Lenaerts, P. Van Nuffel, n. 10 above, at 141 – 147, as well as G. Van Calster and L. Reins, *EU Environmental Law*. Cheltenham: Edward Elgar, forthcoming 2014.
[34] T. Harbo, 'The Function of the proportionality Principle in EU Law' 16 *European Law Journal* 2, 2010, at 165.

account. The Recommendation on shale gas is not a legislative act as such.[35] However the Impact Assessment does contain an "EU Value Added test". This examines the proportionality of the measure, referring amongst others to an earlier Commission study which had concluded that addressing security supply concerns on a solely national level, results in welfare losses, and that a Union approach would "*make the economic case of shale gas clearer*".[36] The Commission further refers to lessons learned in the offshore fossil fuels extraction sector, which was until the establishment of the Offshore Safety Directive an unharmonised activity associated with liability, emergency planning and compliance concerns; as well as to the United States' experience which shale gas.[37]

The Commission thus acts on the basis of Article 292 TFEU with respect to the shared environmental and energy competences. It does so more precisely on grounds of transboundary environmental issues arising with the exploration and production of shale gas, and the expected added value shale gas would bring about to the European energy supply security, as well as increased legal clarity and predictability and a "*level playing field for its safe and secure extraction*".[38] However, it has to be kept in mind that a Recommendation as such is not a legislative proposal and that as a consequence, only a "light" subsidiarity test, as included in the Impact Assessment was carried out. The thresholds for a subsidiarity and proportionality analysis for legislative acts are higher. The Protocol provides for such acts amongst others the consultation of the national parliaments.[39] As Craig puts it, it is "*clear that subsidiarity has had an impact on the existence and form of Community [now Union] action. […]The idea of Community [now Union] control with a "lighter touch" fits with changes that pre-date the Constitution [Lisbon Treaty]*." [40] The next part will turn to this issue and explain why the Commission chose the form of a non- binding Recommendation to address the shale gas within the Union.

2. Why soft law?

The Commission acted on the basis of the EU's shared competence in the areas of environmental and energy policy. As concluded above, the subsidiarity hurdle in the environmental area is generally easy to pass. However, the case of shale gas does not completely fit in the classical internal market and environmental reasoning. Whereas in the past, measures (also) affecting energy issues where adopted in accordance with either of these competences,[41] the Lisbon Treaty, with the introduction of a specific competence on energy issues in Article 194 TFEU, changed the Union's power in this regard by creating a clear

[35] further explained in part 2..
[36] Impact Assessment, n. 13 above at 39f.
[37] Ibid., at 40.
[38] Ibid.
[39] Article 4 of the Protocol No 2, see further below.
[40] P. Craig, 'Competence: clarity, conferral, containment and consideration' 20 *European Law Review* 3 at 343.
[41] See also H. B. Vedder, 'The Treaty of Lisbon and European environmental law and policy' 22 *Journal of Environmental Law* 2, 2010, at 292f.

division of competences between the EU and the Member States [42] and providing for more transparency within energy issues. [43] In brief, it established an own policy competence on energy issues. The inclusion of Article 194 TFEU has been hailed as a "proper policy enabling clause"[44] for a European energy policy, showing that "*energy policy has evolved more than ever into a European subject and is – generally speaking – no longer to be dealt with as a matter for Member States only*";[45] nor has to be adopted on other legal bases such as the internal market, competition or environmental competence.[46]

Article 194 TFEU as a game changer

However, even were Article 194 TFEU to be an appropriate legal basis to promote these aims, the Union is reluctant to establish binding measures on shale gas. This is clearly not the case on the energy basis but also not under the environmental legal basis. This hesitation is not without reason. Article 194 TFEU establishes a specific competence regarding energy issues but at the same time introduces boundaries and limitations. So does Union energy policy aim at ensuring security of energy supply in the Union[47] but at the same time the Article clearly states that *"[Union] measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.*" In the case of shale gas, Article 194 TFEU can be understood as a real 'game changer'. The limitation introduced in Article 194(2) is respected by the Recommendation on shale gas, which states in its Preamble that "*Member States have the right to determine the conditions for exploiting their energy resources, as long as they respect the need to preserve, protect and improve the quality of the environment*".[48] It is thus with a good reason that the Commission opted for a measure under the environmental and energy competence and drafted an environmentally oriented guidance. The environmental focus of the Recommendation is absolutely crucial, as a measure under the energy competence alone seems fairly impossible: the regulation of exploration and production would have clearly impacted the conditions for exploiting energy resources. In having passed a non-binding environmentally oriented guidance, the Commission chose the save option, avoiding discussions on the Union's competence to adopt binding measures on shale gas under either the environmental or energy competence.

The subsidiarity and proportionality discussions referred to above clearly will have had an impact on the Commission's hesitation, too. Moreover, the applicable decision making procedure is a stumbling block. It can be assumed that once a measure becomes subject to

[42] P. Bogdanowicz, 'Division of Competences between the European Union and the Member States in the Area of the European Union Energy Law' in: S. Doumbé-Billé (ed.), *Défis énergétiques et droit international* Brussels: Larcier, 2011 at 202.
[43] B. Nowak, 'Energy Policy of the European Union Chosen legal and political aspects and their implications for Poland', Warsaw, 2009, at 53.
[44] J.C. Pielow and B.J. Lewendel, 'The EU Energy Policy After the Lisbon Treaty' in: A. Dorsman, et al. (eds.) *Financial Aspects in Energy: A European Perspective*, Springer Berlin Heidelberg, 2011, 147 – 165, at 152.
[45] Ibid., 148.
[46] See also H.B. Vedder, note 41 above, at 292f.
[47] Article 194(1)(b) TFEU.
[48] Recital (1) Preamble to the Recommendation.

unanimity,[49] Member States such as Poland and the UK would block a measure on shale gas. A foretaste of this has been given by the blocking of a mandatory EIA for shale gas activities, as discussed above.

Further, normally the subsidiarity principle requires a broad consultation prior to proposing a legislative act and the forwarding of the draft to the national parliaments, as well as an assessment of the financial impact and the consideration of financial and administrative burden.[50] However, this is not required for a recommendation as a recommendation is not considered to be a legislative act. This is certainly one reason why the Commission adopted guidance on shale gas as a form of a recommendation as the Commission did not have to consult the national parliaments or other Union institutions,[51] as the likelihood that Member States such as Poland and the UK which are against European involvement would have protested against a legal measure on subsidiarity grounds is considered to be quite high.

Article 194 TFEU however also refers to the "spirit of solidarity between Member States" in order to "ensure security of energy supply in the Union".[52] This reference has been interpreted in the past as a "corrective of the subsidiarity principle", in the sense that the aims listed in Article 194 TFEU cannot be adhered to on a solely national level and cooperation and action on a Union level is needed. [53] The EU Security of Gas Supply Regulation[54] supports this interpretation. Drafted as a reaction to the 2006 and 2009 gas crisis and the lack of solidarity between Member States, it understands the responsibility for security of gas supply as "a shared responsibility of natural gas undertakings, Member States, […] and the Commission, within their respective areas of activities and competence. Such shared responsibility requires a high degree of cooperation between them."[55] Cooperation and coordination in the area of shale gas extraction has been an issue at the Informal Environmental Council meeting of 16 July 2013 and the Technical Working Group meetings organized for drafting the shale gas impact assessment.[56] While Member States revealed different views on the form of the European involvement on the issue, they were mostly generally in favor of an EU common approach, only one Member State articulated its opposition to any EU approach.[57] As reported earlier, this tendency has been proven in practice.

[49] Here required under Article 192(2)(c) TFEU as the measures arguably may significantly affect a Member State's choice between different energy sources and the general structure of its energy supply.
[50] Article 2 and 5 Protocol No 2. See also P. Craig, n. 40 above, at 324.
[51] Article 292 TFEU.
[52] Article 194 TFEU.
[53] J Pielow, J.C. and Lewendel, B.J., note 44 above, at 153; A second way of understanding the principle is to see it as a restriction to a European energy policy in the way that the Union is only competent to act under the energy competence to render the Member States more independent, as argued in P. Thieffry, 'Les politiques européennes de l'energie et de l'environnement: rivales ou allies?' *Revue des Affaires Européennes*, 2009-2010/4, 2011, at 791.
[54] Regulation No 994/2010 of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295, 1–22 ("Security of Gas Supply Regulation").
[55] Article 3 Security of Gas Supply Regulation.
[56] Impact Assessment, n. 13 above at 19f.
[57] Ibid. at 19.

Article 194(1)(c) TFEU further relies on the Member States solidarity to ”promote energy efficiency and energy saving and the development of *new* and renewable forms of energy”[58] The words “new” and “renewable” are not necessarily cumulative, as they are separated by the connector “and” [59] meaning that the Article also covers the promotion and development of new forms of energy such as shale gas.[60] Applying a narrow interpretation of that provision, one might reason that this provision requires the Union to assess the potential of shale gas resources and its development. This would be in line with the policy approach the Commission is taking so far.

The use of soft law within the EU

A practical application of the proportionality principle arguably promotes the use of non-binding measures. The European Council in 1992 noted on the application of the subsidiarity and proportionality principle that *“[t]he form of action should be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. […]. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Non-binding measures such as recommendations should be preferred where appropriate*.”[61] If the Recommendation on shale gas can lead to a “*satisfactory achievement of the objective of the measure*”, thus the ensurance that “*the public health, climate and environment are safeguarded, resources are used efficiently, and the public is informed*”[62], remains to be seen in the upcoming months. The Commission will review the Recommendation’s effectiveness 18 months after its publication and “*decide whether it is necessary to put forward legislative proposals with legally-binding provisions on the exploration and production of hydrocarbons using high-volume hydraulic fracturing*”.[63]

However, one problem with the adoption of non-binding instruments, especially Recommendations issued by the Commission as the one on shale gas (as opposed to Council Recommendations) is the fact that they are not subject to democratic decision-making on a European level and thus lack a legal status but are still rather important in practice.[64]

[58] Article 194 (1)(c) emphasis added.
[59] As interpreted in the same way by M. Nettesheim, ‘Das Energiekapitel im Vertrag von Lissabon’ 65 *JuristenZeitung*, 1, 2010, at 20.
[60] Under weighting of subsidiarity issues of course, see also ibid.
[61] European Council Conclusions, Edinburgh, 12th December, 1992, at 21. See also K. Lenaerts, n. 17 above, at 885.
[62] Article 1.1 of the Recommendation.
[63] Article 16.4 of the Recommendation.
[64] See also L.A.J. Senden, ‘Soft law and its implications for institutional balance in the EC’ 1 *Utrecht Law Review*, 2, 2005, at 80f, as well as B.A. Beijen, ‘The implementation of European environmental directives: are problems caused by the quality of the directives?’ 20 *European Energy and Environmental Law Review* 4, 2001, at 161; even if Beijen is not directly referring to recommendations.

Conclusion

While the minimum principles on shale gas are an important indicator for a European involvement in the issue, the fact that these are non-binding also illustrates the reluctance and possibly the anxiety of the EU Institutions to interfere with an issue which has in the past been recognized as a key aspect of Member States' sovereignty. The Commission has no exclusive competence in the environmental and energy area and thus has to justify its action and shale gas, however not to the same extent as it would have to do when issuing legislative proposal. Overall, shale gas regulation arguably may easily pass the subsidiarity hurdle on transboundary environmental grounds, however the limitations introduced in Article 194(2) can just as easily prevent a European (legal) measure on shale gas. The reasons why the Commission acted the way it did are in essence twofold: firstly, the fact that Article 194 functions as a 'game changer' in the case of shale gas and prevents a European measure in its entirety, and secondly the fear for "real" subsidiarity discussions when a legislative proposal on shale gas has to go through national parliaments.

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Bio

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